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No.

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

WILLIE E. SHEFFIELD,
Petitioner,
v.
LILLIAN P. ANDREWS, individually and as attorney-in-fact for Minnie May Pugh,
Respondent.

Petition for Writ of Certiorari to the Supreme Court of Alabama

---

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

WHETHER THE ALABAMA STANDARDS GOVERNING POST-VERDICT REVIEW OF PUNITIVE DAMAGE AWARDS, AS INTERPRETED AND APPLIED IN A CASE WHERE $1,000,000 IN PUNITIVE DAMAGES WERE AWARDED BUT THE ACTUAL HARM CAUSED WAS MINIMAL, THE RATIO OF PUNTITIVE DAMAGES TO ACTUAL DAMAGES IS AN ASTOUNDING 100,000 TO 1, THE PUNITIVE DAMAGES AWARDED REPRESENT, AT A MINIMUM, 67 TO 80 PERCENT OF PETITIONER'S NET WORTH, PETITIONER REALIZED NO PROFIT FROM THE CONDUCT AT ISSUE, THE PETITIONER HAS ALREADY RECEIVED CRIMINAL SANCTIONS AND A SENTENCE OF FIVE YEARS AS A RESULT OF THE CONDUCT AT ISSUE, AND PETITIONER RECEIVED NO NOTICE OF THE SEVERITY OF THE PUNISHMENT THAT MAY BE IMPOSED FOR HIS CONDUCT, VIOLATE PETITIONER'S RIGHT TO DUE PROCESS AS GUARANTEED BY THE FOURTEENTH AMENDMENT OF THE U.S. CONSTITUTION.

LISTING OF PARTIES TO PROCEEDINGS BELOW

In addition to the parties shown on the cover, James A. Tucker, Jr. was named as a co-defendant in the original action. However, Tucker did not file a post-judgment motion [*see* R. 5 at 7] and did not take an appeal from the judgment of the trial court.

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JURISDICTIONAL GROUNDS

This appeal is premised upon the jurisdiction of this Court, as stated in 28 U.S.C. § 1257(a). The order and opinion from the Alabama Supreme Court, filed herewith as Appendix D, was rendered on April 12, 1996. Petitioner's application for rehearing was overruled without majority opinion July 19, 1996. Notification of and the dissenting opinions from the overruling of that application for rehearing are found in Appendix F.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Applicable Constitutional Provisions:

U.S. Const., Amendment XIV:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

Ala. Code § 6-11-23. No presumption of correctness; court to conduct hearings; admissible relevant evidence; trial court to independently reassess award of punitive damages.

> (a) No presumption of correctness shall apply as to the amount of punitive damages awarded by the trier of the fact.
>
> (b) In all cases wherein a verdict for punitive damages is awarded, the trial court shall, upon mo-

tion of any party, either conduct hearings or receive additional evidence, or both, concerning the amount of punitive damages. Any relevant evidence, including but not limited to the economic impact of the verdict on the defendant or the plaintiff, the amount of compensatory damages awarded, whether or not the defendant has been guilty of the same or similar acts in the past, the nature and the extent of any effort the defendant made to remedy the wrong and the opportunity the plaintiff gave the defendant to remedy the wrong complained of shall be admissible; however, such information shall not be subject to discovery, unless otherwise discoverable, until after a verdict for punitive damages has been rendered. After such post verdict hearing the trial court shall independently (without any presumption that the award of punitive damages is correct) reassess the nature, extent, and economic impact of such an award of punitive damages, and reduce or increase the award if appropriate in light of the evidence.

STATEMENT OF THE CASE

This case is a civil action to quiet title to real property and for monetary damages by plaintiff against Petitioner Sheffield and co-defendant James A. Tucker, Jr. ("Tucker") [C. 1 at 10-28]. As last amended, the complaint asserted two claims for relief against Petitioner and Tucker: Count One, asserted solely against Petitioner, sought to quiet title to real property by rescinding a deed and several contracts executed by plaintiff on the ground that they were procured by fraud; Count Two sought to recover compensatory and punitive damages from both the Petitioner and Tucker on the ground that they conspired to defraud plaintiff out of her property. [C. 1 at 139-63].

After trial, the jury returned a verdict for plaintiff and against Petitioner and Tucker on both counts. [R. 4 at 758-59]. The jury's verdict found that all of the instruments by which Petitioner claimed title to the property should be rescinded. [C. 2 at 357]. The jury also found that Petitioner and Tucker had conspired to defraud plain-

tiff and awarded plaintiff $10.00 in compensatory damages and $2,000,000 in punitive damages. [C. 2 at 358].

Petitioner filed a consolidated post-trial motion seeking judgment notwithstanding the verdict, or alternatively, a new trial, or alternatively, remittitur. [C. 2 at 364-69]. In his consolidated motion, Petitioner specifically challenged the trial court's ruling on, *inter alia,* the excessiveness of the punitive damages award. [C. 2 at 366-67]. With respect to the excessiveness of the punitive award, Petitioner's Motion alleged that "[t]he amount of punitive damages awarded by the jury was excessive because it exceeded an amount that would be necessary under the facts of this case to accomplish society's goals of punishment and deterrence." [C. 2 at 366-67]. Moreover, Petitioner alleged that "[t]he imposition against this defendant of the punitive damage[s] award in this case would violate, jointly and severally, the Fifth, Eighth, Tenth, and Fourteenth Amendments to the Constitution of the United States; Article One, Sections Seven and Fifteen, of the Constitution of Alabama of 1901; and the Federal Common Law." [C. 2 at 366-67]. As an exhibit to his consolidated postjudgment motion, Petitioner also submitted an Affidavit attesting that his current net worth was $720,300. [*See* Appendix J, Affidavit of Willie E. Sheffield, dated February 27, 1995].

The trial court conducted a hearing on Petitioner's consolidated post-trial motion on May 22, 1995. [C. 3 at 480; R. 5 at 7]. At the hearing, Petitioner contended that the punitive award was excessive and should be reduced because, *inter alia,* his net worth was only $720,300. [R. 6 at 240-51; C. 2 at 370-72, *see also* Appendix J]. Plaintiff contended that Petitioner's net worth was much higher. [R. 6 at 255]. The trial court entered a written order on Petitioner's post-trial motion on June 19, 1995. [C. 3 at 549-54; *see also* Appendix B for full transcript of trial court's order]. In its Order, the trial court specifically found that Petitioner's "assets are probably worth between $1,225,000 and $1,500,000." [C. 3 at 552; Appendix B]. On this basis, the trial court ordered a remittitur of the

punitive award from $2,000,000 to $1,000,000 [C. 3 at 554; Appendix B], which was accepted by plaintiff. [C. 3 at 555-57].

Unable to post a supersedeas bond, on July 13, 1995, Petitioner filed a petition under Chapter 11 of the United States Bankruptcy Code in the United States Bankruptcy Court for the Southern District of Alabama. [C. 3 at 558-60]. Petitioner then timely filed a notice of appeal to the Supreme Court of Alabama on July 25, 1995. [C. 3 at 565-66]. The bankruptcy court granted Petitioner permission to prosecute the appeal on September 14, 1995. [*See* Appellant's Brief before Alabama Supreme Court and Appendix A filed with that brief].

On appeal to the Supreme Court of Alabama, Petitioner specifically challenged, *inter alia,* the excessiveness of the punitive award as remitted by the trial court. On April 12, 1996, the Alabama Supreme Court issued an opinion in which it unanimously affirmed the judgment of the trial court, including the $1,000,000 punitive award. [*See* Appendix D, *Sheffield v. Andrews,* —— So. 2d ——, 1996 WL 173542 (Ala. 1996)].

On April 16, 1996, the United States District Court for the Southern District of Alabama determined that the debt created by the punitive damages award was nondischargeable. [See Appendix C]. On April 18, 1996, Petitioner timely filed an application for rehearing in the Alabama Supreme Court. [*See* Appellant's Application for Rehearing, filed with the Alabama Supreme Court, dated April 17, 1996]. In his brief in support of the application for rehearing, Petitioner again challenged the propriety of the punitive damages award. [*See* Appellant's Brief in Support of Application for Rehearing, filed with the Alabama Supreme Court, dated April 26, 1996]. However, before the Alabama Supreme Court ruled on Petitioner's application for rehearing, this Court released its opinion in *BMW of North America, Inc. v. Gore,* 517 U.S. ——, 116 S.Ct. 1589 (1996), on May 20, 1996. Petitioner apprised the Alabama Supreme Court of the *BMW* decision and requested permission to submit a supplemental brief to ad-

dress the principles established by this Court in *BMW* as they applied to the punitive damages award entered against Petitioner. [*See* Appendix E].

Without ruling on Petitioner's request for permission to submit a supplemental brief, on July 19, 1996, the Alabama Supreme Court overruled the application for rehearing without a majority opinion by a six to three vote. [*See* Appendix F, *Sheffield v. Andrews*, —— So. 2d ——, 1996 WL 406500 (Ala. 1996), dissenting opinions only].

Also as a result of the transactions at issue in this case, Petitioner was indicted in the August 1994 term of the Clarke County Grand Jury under Alabama Code section 38-9-7(g), Abuse, neglect and exploitation prohibited; initiation of charges; Alabama Code section 13A-4-3, Criminal Conspiracy generally; and Alabama Code 13A-8-3, Theft of property in the first degree. [*See* Appendix G]. On June 24, 1996, after a bench trial, the Clarke County Circuit Court entered an Order finding Petitioner not guilty of abuse/neglect/exploitation and not guilty of criminal conspiracy. [See Appendix H]. However, Petitioner was found guilty of Theft of Property in the First Degree. [*See* Appendix H]. The trial court's Order specifically references the transcript of this civil matter as evidence submitted at the criminal trial. [*See* Appendix H].[1] Petitioner was sentenced to five years in the state penitentiary. [See Appendix I].

SUMMARY OF THE ARGUMENT

The Alabama standards governing post-verdict review of punitive damage awards, known as *Hammond/Green Oil* factors in Alabama, as interpreted and applied in this case, clearly violate Petitioner's right to due process as guaranteed by the Fourteenth Amendment. A review of the *Hammond/Green Oil* factors show that the harm that actually occurred or that was likely to occur as a result of the transaction at issue in this case was minimal, the ratio of punitive damages to actual damages awarded

[1] Petitioner's appeal of this conviction is pending before the Alabama Court of Criminal Appeals.

is an astounding 100,000 to 1, the amount of punitive damages awarded represents, at a minimum, 67 to 80 percent of the Petitioner's net worth and is financially devastating to Petitioner, the punitive damages awarded are out of line with those awarded in other more egregious cases, Petitioner realized no profit from the conduct at issue, Petitioner has already received criminal sanctions and a sentence of five years in the state penitentiary as a result of the same transaction, and Petitioner received no notice of the severity of the punishment that might be imposed as a result of this conduct.

As recognized by this Court, "[p]unitive damages may properly be imposed to further a State's legitimate interests in punishing unlawful conduct and deterring its repetition." *BMW of North America, Inc. v. Gore*, 517 U.S. ——, 116 S. Ct. 1589, 1595 (1996). However, the Due Process Clause "imposes substantive limits beyond which penalties may not go." *TXO Production Corp. v. Alliance Resources, Inc.*, 509 U.S. 443, 454, 113 S.Ct. 271, 125 L. Ed. 2d 366 (1993). The punishments exacted in this case, a five year criminal sentence and financial devastation, clearly exceed the constitutional limit and an award of $1,000,000 in punitive damages constitutes a deprivation of Petitioner's property without due process. Accordingly, Petitioner's writ is due to be granted.

REASONS FOR GRANTING THE PETITION

WHETHER THE ALABAMA STANDARDS GOVERNING POST-VERDICT REVIEW OF PUNITIVE DAMAGE AWARDS, AS INTERPRETED AND APPLIED IN A CASE WHERE $1,000,000 IN PUNITIVE DAMAGES WERE AWARDED BUT THE HARM CAUSED WAS MINIMAL, THE RATIO OF PUNITIVE DAMAGES TO ACTUAL DAMAGES IS AN ASTOUNDING 100,000 TO 1, THE PUNITIVE DAMAGES AWARD REPRESENTS, AT A MINIMUM, 67 TO 80 PERCENT OF PETITIONER'S NET WORTH, PETITIONER DID NOT PROFIT FROM THE CONDUCT AT ISSUE, THE PETITIONER HAS ALREADY RECEIVED CRIMINAL SANCTIONS AND A SENTENCE OF FIVE YEARS, AND PETITIONER RECEIVED NO NOTICE OF THE SEVERITY OF THE PUNISHMENT THAT MAY BE IMPOSED, VIOLATE PETITIONER'S RIGHT TO DUE PROCESS AS GUARANTEED BY THE FOURTEENTH AMENDMENT OF THE U.S. CONSTITUTION.

A. Applicable Standards.

1. *Federal Standards.*

The Due Process Clause of the Fourteenth Amendment prohibits a State from imposing a "grossly excessive" punishment on a tortfeasor.[2] *BMW of North America, Inc. v. Gore*, 517 U.S. ——, 116 S.Ct. 1589, 1592 (1996), citing *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 454 (1993) (and cases therein). In *BMW*, this Court stated:

> Punitive damages may properly be imposed to further a State's legitimate interests in punishing unlawful conduct and deterring its repetition. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350, 94 S. Ct. 2997, 41 L.Ed.2d 789 (1974); *Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 266-267, 101 S. Ct. 2748, 69 L.Ed. 2d 616 (1981); *Haslip*, 499 U.S. at

[2] A "grossly excessive" punitive award amounts to an "arbitrary deprivation of property without due process of law." *See TXO Production Corp. v. Alliance Resources Corp.*, 409 U.S. 443, 453, 113 S. Ct. 2711, 125 L. Ed. 2d 366 (1993) (plurality opinion).

> 22. . . . Most States that authorize exemplary damages afford the jury similar latitude, requiring only that the damages awarded be reasonably necessary to vindicate the State's legitimate intersts in punishment and deterrence. *See, TXO*, 509 U.S., at 456; *Haslip*, 499 U.S. at 21, 22. Only when an award can fairly be categorized as "grossly excessive" in relation to these interests does it enter the zone of arbitrariness that violates the Due Process Clause of the Fourteenth Amendment. *Cf. TXO*, 509 U.S. at 456.

BMW, 517 U.S. ——, 116 S. Ct. at 1595.

Additionally, "elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment but also of the severity of the penalty that a State may impose." *BMW*, 517 U.S. ——, 116 S. Ct. at 1598.

2. *Alabama Standards.*

Alabama recognizes the following factors, known as *Hammond/Green Oil* factors, as appropriate for consideration in determining excessiveness of a punitive damages award.[3]

From § 6-11-23, *Ala. Code* 1975 (Supp. 1989):

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[3] In *Henderson v. Alabama Power Company*, 627 So. 2d 878 (Ala. 1993), the Alabama Court struck down the statutory limits placed on punitive damage awards by the State Legislature, as usurping the jury's function and violating the right to trial by jury. Continuing, the Alabama Court added:

> This Court, in *Hammond v. City of Gadsden*, 493 So. 2d 1374 (Ala. 1986), and *Green Oil Co. v. Hornsby*, 539 So. 2d 218 (Ala. 1989), articulated, clarified, and refined the common law mechanism of remittitur, so as to protect defendants on a case by case basis from verdicts so excessive or out of proportion to the wrong or to the individual defendant as to violate the defendant's right not to be deprived of property without due process of law.

Henderson, 627 So. 2d at 893. *Hammond v. City of Gadsden* and *Green Oil Co. v. Hornsby*, and their progeny gave rise to these factors, known in Alabama as *Hammond/Green Oil* factors.

1. Nature, extent and economic impact of verdict on plaintiff or defendant.
2. Amount of compensatory damages.
3. Whether defendant has been guilty of similar acts in the past.
4. The nature and extent of any effort by defendant to remedy the wrong.

From *Green Oil Co. v. Hornsby,* 539 So. 2d 218 (Ala. 1989):

1. Does the punitive damages award bear a reasonable relationship to the harm likely to occur from the defendant's conduct?
2. The degree of reprehensibility of defendant's conduct, including:
   (a) the duration of the conduct;
   (b) the degree of defendant's awareness of any hazard which this conduct has caused or is likely to cause;
   (c) any concealment or cover-up of the hazard;
   (d) existence and frequency of similar past conduct.
3. Punitive damages should remove the profit, if any, from the defendant and should be in excess of the profit so that defendant recognizes a loss.
4. Defendant's financial position.
5. Cost of litigation to the plaintiff.
6. If defendant has received criminal sanctions, that should be taken into account in mitigation.
7. If there have been other civil actions against the same defendant based on the same conduct, this should be taken into account in mitigation of the punitive damages.

From *Hammond v. City of Gadsden,* 493 So. 2d 1374 (Ala. 1986):

1. Culpability of defendant's conduct.

2. The desirability of discouraging others.

3. The impact on the parties.

4. Impact on innocent third parties.

From *Ridout's-Brown Service, Inc. v. Holloway*, 397 So. 2d 125, 127 (1981):

> "The punitive damages award should sting, but ordinarily it should not destroy."

From *Wilson v. Dukona Corp., N.V.*, 547 So. 2d 70, 73 (Ala. 1989):

> "Defendant's 'right to fair punishment' must be considered above plaintiff's right to recover the fullest amount of punitive damages."

From *Aetna Life Ins. Co. v. Lavoie*, 505 So. 2d 1050, 1053 (Ala. 1987):

> "A comparative analysis with other awards in similar cases. . . ." [4]

However, whether consideration of these factors is sufficient to protect defendants from unconstitutional deprivations of property depends upon the interpretation and application given to those factors.[5] "Legal standards need not be precise in order to satisfy this constitutional concern. But they must offer some kind of constraint upon a jury or court's discretion, and thus protection against purely arbitrary behavior." *BMW*, 517 U.S. ——, 116 S. Ct. at 1605 (Breyer, J., concurring, with O'Connor, J. and Souter, J., joining) (citations omitted).

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[4] *See* D. Carr and R. Sanders-Cochran, Punitive Damages and Pre-Verdict Procedures, Life of Georgia: A Bold New Frontier, *Ala. Lawyer*, July 1996, Vol. 57, pp. 225-234.

[5] In *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 111 S. Ct. 1032, 113 L. Ed. 2d 1 (1991), this Court found the Alabama standards governing post-verdict review of punitive damage awards, as interpreted and applied in *Haslip*, passed constitutional muster. However, in the recent case of *BMW of North America, Inc. v. Gore*, 517 U.S. ——, 116 S. Ct. 1589 (1996), a majority of this Court held that the manner in which the Alabama Supreme Court interpreted and applied these same factors resulted in a "grossly excessive" award and violated BMW's right to due process.

B. The Alabama Standards Governing Post-Verdict Review of Punitive Damage Awards, As Interpreted and Applied in This Case, Violate Petitioner's Due Process Rights.

Upon consideration of the factors approved by the Alabama Supreme Court for review of punitive awards, it is clear that the amount of punitive damages awarded in this case is grossly excessive and is thereby violative of Petitioner's due process rights.

1. The harm that actually occurred was minimal.

The relationship between the harm that actually occurred or that is likely to occur from the defendant's conduct is a proper consideration when reviewing a punitive damages award for excessiveness. *BMW of North America, Inc. v. Gore*, 517 U.S. ——, 116 S. Ct. 1589 (1996); *Green Oil Co. v. Hornsby*, 539 So. 2d 218 (Ala. 1989). In this case, the trial court found that the harm caused by Petitioner's conduct was "grevious." [C. 3 at 550; *see also* Appendix B]. However, Petitioner notes for this Court that the jury awarded plaintiff only $10.000 in actual damages *and* granted plaintiff title to the property in question. [C. 2 at 357-58, 359-63]. Thus, the actual harm that occurred, as determined by the jury, was very minimal.

However, the trial court continued, stating that "[t]he fraudulent scheme, had the plaintiffs died, would have transferred the bulk of each estate to the defendant Sheffield, depriving charitable entities of substantial assets." [C. 3 at 550; *see also* Appendix B]. However, this finding fails to take into account that, under the agreement, Petitioner would have been required to pay plaintiff's estate for whatever interest plaintiff owned in the subject property. Under the 1992 agreements, if, at the time of her death, plaintiff owned one-half interest in the property, Petitioner would have owed her estate $250,000. [*See* Appendix L]. If, at the time of her death, plaintiff had inherited her sister's interest in the property, Petitioner would have owed her estate $500,000. [*See* Appendix

L]. Accordingly, the charitable trust created by plaintiff's will would have been funded with cash instead of land—an action the trustees were authorized to take under the provisions of the will. [*See* C. 7 at 1318, 1320, *see also* Appendix M]. Petitioner asserts that such a situation does not constitute especially grevious harm requiring such a large amount of punitive damages.

2. The degree of reprehensibility of Petitioner's conduct does not require such an excessive verdict.

In *Green Oil Co. v. Hornsby,* 539 So. 2d 218 (Ala. 1989), the Alabama Supreme Court identified several factors relevant to determining the reprehensibility of a defendant's conduct. Those factors include: (1) the duration of the defendant's conduct; (2) the degree to which the defendant was aware that his conduct had caused or was likely to cause harm; (3) any concealment or "cover-up" of the harm; and (4) the existence and frequency of similar past conduct. *Green Oil Co.,* 539 So. 2d at 223. With respect to these factors, the trial court found (1) that Tucker's conduct was reprehensible; (2) that Sheffield was the "moving force" in Tucker's betrayal of Andrews; (3) that Sheffield knew that his conduct would cause harm; and (4) that there was an attempted cover-up of the fraud. [C. 3 at 550-51].

Petitioner conceded that Tucker's conduct was reprehensible but disputed the other findings of the trial court. For example, as discussed in Section B.1., *supra,* Petitioner disputes the trial court's finding that he knew his conduct had caused harm or was likely to cause harm. Petitioner also disputes the trial court's finding that he attempted to cover-up the harm and offered a logical explanation for his failure to record the deed in the Probate Court records.[6] Additionally, the trial court specifically found there were no other similar acts of miscon-

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[6] Sheffield testified that the documents were not recorded, not to conceal any alleged fraud but because plaintiff did not want her family to know that she was selling her interest in the subject property. [R. 3 at 540.]

duct by Petitioner.[7] Accordingly, this case involves an isolated incident that resulted in minimal harm. Based on these factors, Petitioner's conduct does not require such an excessive amount of punitive damages.

3. *The ratio of punitive damages to actual damages is an astounding 100,000 to 1.*

Both this Court and the Alabama Supreme Court recognize that the ratio of punitive damages to actual damages is a significant factor when considering excessiveness of punitive damage awards.[8] In *Haslip*, this Court concluded that even though a punitive damages award of "more than 4 times the amount of compensatory damages," might be "close to the line," it did not "cross the line into the area of constitutional impropriety." *BMW*, 517 U.S. ——, 116 S. Ct. at 1602, citing *Haslip*, 499 U.S. at 23-24. This Court continued:

> [W]e have consistently rejected the notion that the constitutional line is marked by a simple mathematical formula, even one that compares actual and potential damages to the punitive award. *TXO*, 509 U.S. at 458. Indeed, low awards of compensatory damages may properly support a higher ratio than high compensatory awards, if, for example, a particularly egregious act has resulted in only a small amount of economic damages. A higher ratio may

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[7] In its *Hammond Order*, the trial court stated "[t]here is not significant evidence that either defendant had committed similar acts in the past." [C. 3 at 551]. Accordingly, this factor does not favor a large punitive verdict. *See BMW*, 517 U.S. ——, 116 S. Ct. at 1599-1600.

[8] "The principle that exemplary damages must bear a "reasonable relationship" to compensatory damages has a long pedigree. . . . Our decisions in both *Haslip* and *TXO* endorsed the proposition that a comparison between the compensatory award and the punitive award is significant." *BMW*, 517 U.S. ——, 116 S. Ct. at 1601-02. However, compare this to the trial court's *Hammond* Order, in which the trial judge stated "[t]he undersigned judge is of the opinion that there should be no logical connection between the amount of compensatory damages awarded and the amount of punitive damages." [C. 3 at 553; *see also* Appendix B].

> also be justified in cases in which the injury is hard to detect or the monetary value of noneconomic harm might have been difficult to determine. It is appropriate, therefore, to reiterate our rejection of a categorical approach. Once again, "we return to what we said . . . in *Haslip*: 'We need not, and indeed we cannot, draw a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable that would fit every case. We can say, however, that [a] general concer[n] of reasonableness . . . properly enter[s] into the constitutional calculus.'" *TXO*, 509 U.S. at 458 (quoting *Haslip*, 499 U.S. at 18). In most cases, the ratio will be within a constitutionally acceptable range, and remittitur will not be justified on this basis. When the ratio is a breathtaking 500 to 1, however, the award must surely "raise a suspicious judicial eyebrow." *TXO*, 509 U.S., at 482 (O'Connor, J., dissenting).

BMW, 517 U.S. ——, 116 S. Ct. at 1602-03.

In this case, the jury awarded plaintiff actual damages of $10.00 and punitive damages of $2,000,000. After remittitur by the trial court to $1,000,000, the ratio of punitive damages to actual damages remained an astoundingly "breathtaking" 100,000 to 1.[9] This amount was affirmed by the Alabama Supreme Court. Even if the interpretation and application of all other factors are sound and correct, Petitioner asserts that, on this basis alone, the punitive award is grossly excessive and deprives him of his property without due process.

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[9] The trial judge's *Hammond* Order stated "[t]he undersigned judge is of the opinion that there should be no logical connection between the amount of compensatory damages awarded and the amount of punitive damages. An act as despicable as this fraudulent conspiracy should be severly punished notwithstanding the fact that the discovery of the conspiracy was successfully thwarted, and the plaintiffs have [received] or will receive, a rescission of all of the fraudulent transactions." [*See* C. at 549-54, Appendix A, at p. 8; Appendix B].

4. *The impact of the verdict as affirmed is financially devastating to Petitioner.*

In addition to an astounding ratio of punitive damages to actual damages, the punitive award in this case imposes a devastating financial burden on Petitioner. The amount of punitive damages awarded against Petitioner after remittitur equal 67 to 80 percent of Petitioner's net worth if the trial court's valuation of Petitioner's assets is accepted.[10] This percentage is even higher under Petitioner's own valuation of his net worth. The Alabama Supreme Court has stated "only in the rarest of cases should [a punitive award] be large enough to destroy; this is not its purpose." *Green Oil Co. v. Hornsby*, 539 So. 2d 218 (Ala. 1989), quoting *Ridout's-Brown Service, Inc. v. Holloway*, 397 So. 2d 125, 127 (Ala. 1981). Clearly, an award of 67 to 80 percent of a defendant's disputed net worth will devastate and destroy Petitioner financially.[11]

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[10] Petitioner's net worth was sharply disputed at the *Hammond* hearing. Petitioner represented to the trial court that his net worth was approximately $720,000. Using this figure, the punitive award as remitted, totals 140 percent of Petitioner's net worth. However, the trial court found evidence that Petitioner had undervalued his net worth by approximately 50%. [*See* Appendix B]. Therefore, for purposes of evaluating the economic impact of the punitive damages award on Petitioner, the trial court set Petitioner's net worth at approximately $1,225,000 to $1,500,000. [*See* Appendix B]. Using this figure, the punitive damages award as remitted represents between 67 and 80 percent of Petitioner's net worth. Thus, the trial court already has factored into the equation any effect of Petitioner's possible undervaluation to the court as to his net worth; no further adjustments to the amount of punitive damages awarded are needed to account for this possibility. Even after rejecting Petitioner's representations as to his net worth and adopting its own valuation of Petitioner's assets, the punitive damages awarded by the jury exceeded Petitioner's net worth as found by the trial court.

[11] On November 14, 1995, the punitive award of $1,000,000 was ruled nondischargeable by the United States Bankruptcy Court. [*See* Appendix C].

5. A comparative analysis with other cases indicates this verdict as affirmed is grossly excessive.

A comparative analysis with other awards made in similar cases is also a proper consideration when reviewing punitive damages awards for excessiveness and appropriateness. *See Aetna Life Ins. Co. v. Lavoie,* 505 So. 2d 1050, 1053 (Ala. 1987). Few Alabama opinions deal with punitive damage awards against individuals; most address awards against corporations and business entities. However, no Alabama opinion has *ever* upheld any award of punitive damages totaling anywhere close to 67 to 80 percent of an individual or a corporate defendant's net worth. In fact, compare the result of this case to that of *Wilson v. Dukona Corp. N.V.*, 547 So. 2d 70 (Ala. 1989), an action against an individual defendant for the wrongful cutting of timber. In *Wilson,* the Alabama Supreme Court remitted the entire punitive award of $21,000 against the individual defendant because of his abject poverty.

Also compare the award in this case to awards made against large corporate defendants in other more egregious cases.[12] For example, in the case of *General Motors Corp. v. Johnston,* 592 So. 2d 1054 (Ala. 1992), the jury awarded $15,000,000 in punitive damages, finding that GMC failed to recall some 600,000 vehicles con-

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[12] Also compare the result in *Sheffield* to that of *Intercontinental Life Ins. Co. v. Lindblom,* 598 So. 2d 886 (Ala. 1992), a bad faith action in which the jury awarded over $3,000,000 against the defendant insurance company. On review, the Alabama Supreme Court found widespread evidence of similar misconduct by the defendant and attempts by the defendant to conceal facts related to its wrongdoing. Despite the number of *Green Oil* factors favoring a large verdict, the Court affirmed the verdict conditioned upon remittitur to $1,000,000. *See also American Pioneer Life Ins. Co. v. Williamson,* —— So. 2d ——, 1995 WL 372051 (Ala. 1995) (Alabama Supreme Court remitted $3,000,000 punitive award, which represented only 6 percent of insurer's total assets, to $2,000,000); *Northwestern Mut. Life Ins. Co. v. Sheridan,* 630 So. 2d 384 (Ala. 1993) (over $25,000,000 punitive award remitted by 50 percent; final award represented less than one percent of Northwestern's total assets).

taining faulty computer chips despite GMC's knowledge that such a defect would risk lives and property. On appeal, the Alabama Supreme Court found the reprehensibility of defendant's conduct to be great. However, the Alabama Court remitted the verdict to $7,500,000 despite the fact that the wrongdoer was a mammoth corporation and evidence indicated GMC made over $42,000,000 in profits from the sale of those 600,000 vehicles alone.

It is not suggested that the *Johnston* award was insufficient or insignificant or that Petitioner should no be punished for his misconduct. However, the punitive damages awarded in *Johnston* and other egregious cases were nowhere near 67 to 80 percent of the corporate defendants' net worth. This is true despite the fact that the corporate defendants were found to have caused greater actual harm in multiple transactions that affected numerous persons while Petitioner's failed fraudulent attempt consisted of an isolated transaction which resulted in $10.00 of actual damages. Clearly, this award as affirmed is out of line with other awards of punitive damages.

6. The amount of profit to Petitioner as a result of this conduct favors a substantial remittitur.

The Alabama Supreme Court has stated that "punitive damages should remove the profit, if any, from the defendant and should be in excess of the profit so that the defendant recognizes a loss." *Green Oil Co. v. Hornsby,* 539 So. 2d 218 (Ala. 1989). In this case, the trial court found that the amount of profit Petitioner would have realized, if no lawsuit had been brought and plaintiff had died, was impossible to determine with any reasonable degree of certainty because of the number of variables involved. [C. 3 at 551; Appendix B]. This Petitioner agrees and asserts that such speculations are unnecessary as well. The judgment in this case, required not only an award of monetary damages, but also, rescission of the underlying transaction as well. [C. 3 at 551]. Consequently, plaintiff's property was returned to her and Petitioner realized no profit whatsoever from the transac-

tion at issue in this case. Accordingly, this factor supports a substantial remittitur of the punitive award.

7. Criminal sanctions against Petitioner arising from the same conduct are to be considered in mitigation of a large verdict and therefore, support a substantial remittitur.

In addition, to the factors discussed above, if the defendant has received criminal sanctions, that fact should be considered in mitigation of a punitive damages award. *See Green Oil Co. v. Hornsby,* 539 Co. 2d 218 (Ala. 1989). At the time of the hearing on Petitioner's consolidated post-trial motion, criminal charges were pending against Petitioner as a result of the transaction at issue in this case. The trial court recognized this fact in its Order. [C. 3 at 552; *see also* Appendix B.]

However, since the date of the trial court's Order, Petitioner has been convicted of Theft of Property in the First Degree and sentenced to a split sentence of five years in the state penitentiary. [*See* Appendices H and I]. Thus, Petitioner has already received the criminal punishment determined by the State of Alabama to be appropriate for his actions; he also has incurred additional litigation expenses in relation to the misconduct at issue in this case. Alabama's standards governing post-verdict review of punitive damage awards recognize that such criminal sanctions favor a remittitur of the verdict. *See Green Oil Co. v. Hornsby,* 539 So. 2d 218 (Al. 1989).

As previously stated by this Court, "[p]unitive damages may properly be imposed to further a State's legitimate interests in punishing unlawful conduct and deterring its repetition." *BMW of North America, Inc. v. Gore,* 517 U.S. ——, 116 S. Ct. at 1595 (other citations omitted). Once those legitimate interests have been served, any additional punishment must be considered grossly excessive. As also recognized by this Court, the Due Process Clause "imposes substantive limits beyond which penalties may not go." *TXO Production Corp. v. Alliance Resources,*

Ins., 509 U.S. 443, 454, 113 S. Ct. 271, 125 L. Ed. 2d 366 (1993). The penalty exacted in this case far exceeds that allowed by the Due Process Clause.

8. Plaintiff's costs of litigation do not favor a large punitive verdict.[13]

Alabama standards governing post-verdict review of punitive awards mandate that the plaintiff's costs of litigation be considered when reviewing whether a punitive award is excessive. *See Green Oil Co. v. Hornsby*, 539 So. 2d 218, 223 (Ala. 1989). Such a policy is said to encourage plaintiffs to bring wrongdoers to trial. *Id.*

In this case, the trial court determined that the cost of litigation was not "above average and [was] not a significant factor in favor of remittitur." [C. 3 at 552; *see also* Appendix B.] Accordingly, this factor does not favor a large punitive award.

9. Petitioner's failure to remedy the wrong prior to trial should not be used to sustain an excessive punitive award against him.

Section 6-11-23(b), Code of Alabama 1975, requires a court reviewing a punitive award to consider in support of a motion for remittitur any efforts by the defendant to remedy the wrong complained of and whether defendant was given any opportunity to do so by the plaintiff.

Before the trial of this case, plaintiff offered to refund the purchase money Petitioner had deposited with Tucker if Petitioner would relinquish his claim to the subject property. Petitioner rejected the proposal. [R. 5 at 1132-34; C. 7 at 1238]. Based upon these facts, the trial court found, in its *Hammond* Order, that, although given the

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[13] In addition to the factors discussed *supra*, the trial court's Hammond Order addressed the following: "efforts to remedy the wrong," "plaintiff's costs of litigation," and "other civil actions." [C.3 at 551-53]. Although not addressed in depth in this Petition, such factors are included to show that they were properly considered and found to have no impact upon Petitioner's motion for remittitur.

opportunity before trial to remedy the wrong, Petitioner had refused to do so. [C. 3 at 551]. Petitioner concedes he rejected the proposal only because plaintiff could not make good on the proposal. That is, she could not return the full purchase money ($428,500) because Tucker had stolen $28,500 of those proceeds. Under the circumstances of this case, this factor should not be used against Petitioner to support an excessive punitive award.[14]

10. No other civil actions arising from the conduct at issue in this case exists or will be brought. Accordingly, this factor is inapplicable to the analysis of this case.

In Alabama, if there have been other civil actions against the same defendant, based on the same conduct, this must be taken into account in mitigation of the punitive damages award. *See Green Oil Co. v. Hornsby,* 539 So. 2d 218, 224 (Ala. 1989). In this case, the trial court found that "[t]here are no other civil actions that could be brought against . . . Sheffield for the wrong doing involved in this case." [C. 3 at 552-53; Appendix B]. Therefore, this factor is inapplicable to the review of the punitive award in this case.

11. Petitioner received no prior notice of the severe penalty that might be and, in fact, was imposed against him.

In addition to the factors recognized by the Alabama Supreme Court as appropriate for post-verdict review of punitive damage awards, this Court has recognized that "[e]lementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment but also of the severity of the penalty that a State may impose." *BMW*, 517 U.S. ——, 116 S. Ct. at 1598. However, notice of the potential for this severe a penalty cannot be found in Alabama's standards govern-

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[14] In any event, Petitioner asserts that his refusal to settle a valid legal dispute prior to trial is not a proper basis for upholding an award found excessive on other grounds.

ing post-verdict review of punitive awards. In fact, the Alabama Supreme Court has stated "[w]e are all in agreement that [an] award [of punitive damages] . . . ought to be large enough to hurt. It ought to sting in order to deter, this is not its purpose." *Green Oil Co. v. Hornsby*, 539 So.2d 218, 222 (Ala. 1989) quoting *Ridout's-Brown Service, Inc. v. Holloway*, 397 So.2d 125, 127 (Ala. 1981). Accordingly, Alabama's standards notified Petitioner that the award ordinarily *should not* destroy him.

Additionally, as noted in Section B.5, *supra*, previous opinions of the Alabama Supreme Court provide no notice to Petitioner of the potential severity of the award. Because no Alabama opinion has *ever* upheld any award of punitive damages totaling anywhere close to 67 to 80 percent of an individual defendant's net worth, the prior opinions of the Alabama Supreme Court failed to notify Petitioner of the harsh penalty he faced.

CONCLUSION

Based on the foregoing, the Alabama standards governing post-verdict review of punitive damage awards clearly violate Petitioner's right to due process as guaranteed by the Fourteenth Amendment, in a case where $1,000,000 in punitive damages were awarded but the facts establish that:

- the harm that actually occurred or that was likely to occur was minimal,
- the ratio of punitive damages awarded to actual damages awarded is an astounding 100,000 to 1,
- the amount of punitive damages awarded represents, at a minimum, 67 to 80 percent of the Petitioner's net worth,
- a comparative analysis with other awards indicates the punitive damages awarded are excessive,
- Petitioner realized no profit from the conduct at issue in the case,

- Petitioner has already received criminal sanctions and a sentence of five years in the state penitentiary as a result of the same transaction,
- Petitioner received no notice of the severity of the punishment that might be imposed.

Accordingly, Petitioner's writ is due to be granted.

Respectfully submitted,

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